CITY OF SAN DIEGO
ETHICS COMMISSION

Office of the Executive Director

MEMORANDUM

DATE: June 30, 2010

TO: Chair and Members of the San Diego Ethics Commission

FROM: Stephen Ross, Program Manager

SUBJECT: Election Campaign Control Ordinance and the *Thalheimer* Lawsuit
Docketed for Ethics Commission open session meeting on July 8, 2010

The following two issues relate to the Ethics Commission's ongoing discussion of the impact of the *Thalheimer v. City of San Diego* litigation on the City's Election Campaign Control Ordinance [ECCO].

A. Enforcement of San Diego Municipal Code sections 27.2930(b) and (c), and 27.2936(d)

At its June 10, 2010, meeting, the Ethics Commission discussed the ruling on the preliminary injunction in the *Thalheimer* case that precludes the City from enforcing San Diego Municipal Code [SDMC] section 27.2936 with regard to general purpose recipient committees [GPRCs] that only make independent expenditures. The effect of the court's ruling was to lift all source and amount restrictions on the funding used by these GPRCs to make independent expenditures. At the June meeting, the Commission also discussed the recently adopted $1,000 limit on contributions from political party committees to City candidates, and decided that section 27.2936's restrictions should also not apply to such committees, at least for as long as the $1,000 limit remains in effect.

The Commission's decision, coupled with the court's ruling, raises a related question concerning the disclosure requirements in ECCO that are designed to identify the funding sources used by GPRCs when supporting or opposing City candidates. If a GPRC is no longer subject to source and amount restrictions when making independent expenditures to support or oppose City candidates, is there any reason to enforce the disclosure requirements that were created to verify compliance with those restrictions?

By way of background, ECCO was amended in 2004 to adopt SDMC section 27.2936, which required GPRCs participating in City candidate elections to use only funds from individuals in amounts not exceeding $250.[1] To ensure compliance with these source and amount restrictions,

[1] In 2009, this amount increased to $500.

SDMC section 27.2936(d) required that: "A general purpose recipient committee that attributes a contribution to an individual for the purpose of supporting or opposing one or more candidates seeking elective City office shall comply with the reporting requirements set forth in section 27.2930(b) and (c)."

Section 27.2930(b) and (c) established a process by which GPRC would re-report the contributions of $100 or more used to fund campaign advocacy in a City candidate election. For example, if John Smith donated $3,000 to a GPRC, and months later the GPRC used $500 of that donation on yard signs supporting City Candidate Jones, the GPRC would initially report the $3,000 contribution in accordance with standard reporting requirements[2], and then re-report the portion of the contribution ($500) used for the yard signs supporting Candidate Jones within six months of making the independent expenditure. Thus, under section 27.2930(b) and (c), the public would be able to see that the funds used by the GPRC to support a City candidate were attributed to an individual (John Smith) and were within the contribution limit ($500). Without section 27.2930(b) and (c), neither the public nor any enforcement entity had any way of knowing whether a GPRC was using conforming dollars (rather than large sums from a corporate entity) when participating in City candidate elections.

As a result of the court's preliminary injunction in the *Thalheimer* case, there is no longer a requirement that GPRCs use "conforming" funds when making independent expenditures in City candidate elections. Or stated another way, all funds are now "conforming." Any entity may give unlimited sums to a GPRC for that GPRC to spend on independent expenditures supporting or opposing a City candidate. Using the above example, it is now lawful for a GPRC to use a large donation from a corporate entity to pay for yard signs supporting Candidate Jones. Thus, the rationale for re-reporting has largely disappeared.

With regard to political party committees making contributions to candidates, the re-reporting requirement also appears to have minimal benefit under the present circumstances. So long as there is a $1,000 limit in place, a re-reporting would, at most, result in a political party committee attributing $500 to two individuals (or $250 to four individuals, or some similar variation). The $1,000 limit itself largely curtails the possibility of a political party committee being used as a pass-through to circumvent the limits in place for direct contributions to City candidates.

For the above reasons, Commission staff recommends that SDMC sections 27.2930(b) and (c), and 27.2936(d) not be enforced for so long as (1) the courts enjoin the City from enforcing the source and amount restrictions in SDMC section 27.2936 on committees making independent expenditures; and (2) there is a $1,000 limit on contributions from political party committees to City candidates.[3] As you know, these issues are part of the pending appeal before the Ninth Circuit.

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[2] Under state law, GPRCs are required to identify each individual and entity making a contribution of $100 or more and each independent expenditure of $100 or more made in a City of San Diego election.

[3] This recommendation does not apply to any large contributions made by a political party committee to a City candidate prior to the effective date of the $1,000 limit. In such cases, re-reporting would have an important anti-circumvention purpose.

B. $50,000 Threshold for Identifying Major Contributors on Campaign Advertisements

At the Commission's June 10, 2010, meeting, Commissioner O'Neill inquired about the origins of the $50,000 threshold used in state and local law in the context of requiring the identification of large contributors on campaign advertisements supporting ballot measures. The $50,000 figure has its origins in the adoption of Government Code sections 84503, 84504, and 84506, which were added to the state's Political Reform Act in 1996 with the passage of Proposition 208. Because these sections were added to state law by the initiative process, rather than by an act of the State Legislature, there are few public resources relating to the drafting process. The evaluation of the measure by the state's Legislative Analyst does not even mention the $50,000 threshold. The advertisement disclosure statutes were a relatively minor part of Proposition 208's comprehensive changes to the Political Reform Act, which included limiting contributions to state and local candidates; limiting campaign spending; banning transfers of money between candidates; and precluding lobbyists from making or arranging contributions.[4]

Proposition 208 was drafted by Californians for Political Reform, a committee sponsored by the League of Women Voters of California, the American Association of Retired Persons – California, Common Cause, and United We Stand America. The committee terminated more than ten years ago, leaving behind little public information regarding the drafting process in general or the $50,000 threshold in particular. At most, the text of Proposition 208 states that one of its "Findings and Purposes" is "[t]o meet the citizens' right to know the sources of campaign contributions, expenditures, and political advertising." The argument in favor of Proposition 208 published in the ballot pamphlet states that passage of the measure would "require full disclosure of those who pay for initiative ads." Unfortunately, the ballot materials contain no other mention of the advertising disclosure statutes. The $50,000 threshold amount is not identified anywhere in the ballot materials other than in the text of the proposition itself.

Although the FPPC issued several memoranda discussing the advertisement disclosure statutes in connection with its efforts to draft related regulations, the FPPC has no authority to change the statutory dollar amount and its memoranda therefore did not discuss the appropriateness of the dollar amount or the rationale upon which the amount was based.

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Stephen Ross
Program Manager

[4] Shortly after the passage of Proposition 208, a court challenge led to a preliminary injunction barring enforcement of the entire measure. When Proposition 34 passed in November of 2000, it essentially repealed all of Proposition 208 except for the advertising disclosure statutes. Several months later, the injunction was lifted as to the advertising disclosure statutes.